73-155

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 73-155

PATRICK J. DORAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner, Patrick J. Doran, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Circuit Court entered in the above-entitled case on June 20, 1973.

CITATION TO THE OPINION BELOW

The judgment order of the United States Court of Appeals for the Third Circuit, printed in Appendix A hereto, *infra,* p. App. 1, 2, 3, is unreported at the present.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on June 20, 1973, Appendix A, pp. App. 1, 2, 3, *infra*.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether due process or "civilized standards of procedure and evidence" require the striking of witnesses' testimony as to dates of payments of extortion when the testimony is based upon a diary and a memo book in the possession of the Government for months before trial, but no disclosure of the books or the dates is made until the date of the witnesses' testimony despite a pretrial order that the Government provide the defense with as great a specificity of dates as possible and that exhibits be provided 20 days before trial?

CONSTITUTIONAL PROVISIONS INVOLVED

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Const. Amend V.

In all criminal prosecutions, the accused shall enjoy the

right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. U.S. Const. Amend VI.

STATUTES AND RULE INVOLVED

Title 18, Section 1951, United States Code:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section–

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT OF THE CASE

On July 19, 1972, a federal Grand Jury returned a seven-count indictment (Criminal No. 480-72) charging Patrick J. Doran along with Anthony Marrazzo with conspiracy and extortion in violation of 18 U.S.C. § 1951 (Hobbs Act). Both Doran and Marrazzo entered pleas of not guilty on August 10, 1972.

Count I charged the defendants with conspiracy to "obstruct, delay and affect commerce" by extortion. Counts II through VII charged the defendants with the actual extortion of six firms doing business in the District of New Jersey.

The trial of the case commenced on November 13, 1972 before the Honorable Mitchell H. Cohen and a jury. On November 21, the court severed defendant Marrazzo from the trial and dismissed Counts I and VII against Doran. Marrazzo subsequently pled guilty to a superseding Information. He also was called as a witness by Doran.

On November 24, the jury returned a verdict of guilty against appellant on Counts II through VI. On January 10, 1973 Judge Cohen sentenced Doran to a prison term of 5 years and a fine of $10,000 on Count II. He also sentenced appellant to prison terms of 5 years and fines

of $10,000 on each of Counts III through VI, the sentences to run concurrent with each other and concurrent to the sentence imposed on Count II.

After the prosecution of a timely appeal, the judgment of January 10, 1973, was affirmed by a judgment Order entered by the Third Circuit Court of Appeals on June 10, 1973.

REASON FOR GRANTING THE WRIT

A prosecutor's disregard of a court order, and consistent failure to deliver information to the defense when such information is in the possession of the prosecution, and is the subject of a court order to disclose, constitutes a grave question which has not recently been addressed by this Court. The issue is not one of prejudice but of tolerance of improper prosecutorial activity. The question is whether the diary and memo book supporting the testimony of the key Government witnesses may be suppressed while in Government possession for months, and the dates of the alleged offenses supported by the books not disclosed until the witnesses approach the stand for testimony when these actions contravene an existing court order.

The excuse of the Government attorneys at trial when the defense moved to strike the witnesses' testimony was that a "decision to use" the books had not been made until the witnesses took the stand. They had previously complained of an inability to specify exact dates when the books had been in their hands for months. (Record 337-348; 576-77; 747-750.) Clearly the diary and memo book were key items of evidence which any lawyer would have recognized instantly. The refusal to specify dates as "impracticable" when those dates were shown specifically in the books is clearly one made in bad faith.

Misrepresentations to the court, refusal to obey court orders, and trial by surprise all seem inconsistent with due process or at least, "civilized standards of procedure and evidence." *McNabb v. United States*, 318 U.S. 338, 340 (1943). See also, *Jencks v. United States*, 353 U.S. 657 (1956); *Dennis v. United States*, 384 U.S. 855 (1966).

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE W. SHADOAN
1500 Massachusetts Avenue, N.W.
Washington, D.C. 20005

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1121

UNITED STATES OF AMERICA

v.

PATRICK J. DORAN and
ANTHONY F. MARRAZZO

PATRICK J. DORAN, *Appellant*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Submitted under 3rd Cir. Rule 12(6) June 19, 1973
Before VAN DUSEN, ALDISERT and ADAMS,
Circuit Judges

John A. Yacovelle, Jr., Esq.,
Cherry Hill, New Jersey,
Attorney for Appellant

Herbert J. Stern, U.S. Attorney,
Richard S. Zackin & Richard D.
Shapiro, Assistant U.S. Attorneys,
Newark, New Jersey,
Attorneys for Appellee

JUDGMENT ORDER

After consideration of (I) the contentions of the defendant-appellant that:

(A) the court erred in failing to quash the indictment or suppress evidence in support thereof, or to grant a continuance since it appeared, prior to trial, that the Government had failed to comply with the court's order requiring a Bill of Particulars, and the court further erred in refusing to strike the testimony of a Government witness since it appeared during the trial that the non-compliance of the Government with the foregoing order resulted from bad faith,[1]

(B) the court erred in permitting cross-examination of the defense witness Marrazzo and the defendant Doran concerning prior crimes allegedly committed by the defendant which were not the subject of the indictment on trial and were in fact barred by the statute of limitations,

(C) the court erred in admitting evidence that an attorney previously representing the defendant

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[1] This contention is further subdivided in appellant's brief as follows:

"(A) The Court erred in refusing to dismiss the Indictment or in the alternative to grant a thirty-day continuance upon receipt by the defense of the government's 'Bill of Particulars.'

"(B) The Trial Court erred in refusing to strike the testimony of Kammerer even when it became apparent that the government had acted in bad faith."

See *United States v. Provenzano*, 334 F.2d 678 (3d Cir.), *cert. denied*, 379 U.S. 947 (1964). It is noted that the indictment in *Provenzano* covered a period of seven years, whereas the indictment in the instant case only covered a period of four years. In other respects, there is no significant difference between the indictments.

allegedly suggested suppression or destruction or fabrication of evidence by a Government witness, and

(D) the court committed error in instructing the jury;[2]

(II) the briefs of counsel; and (III) the record,

It is ORDERED AND ADJUDGED that the January 10, 1973 judgment and commitment is affirmed.

BY THE COURT:–

/s/ Van Dusen
Circuit Judge

Dated: June 20, 1973

ATTEST:

Clerk

[2] The alleged error consisted of the failure to include in the charge defendant's first three requests for charge.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-155

PATRICK J. DORAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the government failed to comply with a court order for a bill of particulars.

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of five counts of extortion in violation of 18 U.S.C. 1951 (Hobbs Act).[1] He was given concurrent five-year prison sentences and fined $10,000 on each count. The court of appeals affirmed without opinion (Pet. App.).

It was shown at trial that petitioner, in his capacity as Atlantic County Engineer between 1965 and 1971, extorted money from various road construction and engineering firms in return for awarding them contracts with the county. At trial, petitioner did not deny receiving

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[1] A co-defendant, whose case was severed before trial, subsequently pleaded guilty.

any of the extortion payments (Tr. 1075-1077, 1084-1085, 1097, 1107-1108); rather, he asserted that they were political contributions which he turned over to a local political organization.[2]

Petitioner claims that he was denied due process by the failure of the prosecution to make available to him the diaries of one of the extortion victims (Kammerer) until the day before trial commenced and the memo books of another victim (Continisio) until just prior to his testimony. He also alleges that these failures were so improper as to warrant reversal regardless of whether he was prejudiced (Pet. 5). There is no merit to these contentions.

After a hearing on a defense motion for a bill of particulars, the district court ordered the government to identify more specifically the time during which the extortion took place[3] and to disclose all documents which it intended to use at trial. It further directed that any documents the government later decided to use should be turned over as soon as possible (Tr. of Nov. 13, pp. 30-31). Pursuant to this order, the government provided petitioner with approximately 300 documents; it later turned over another 150 documents and the petitioner's grand jury testimony. The government also identified the months between 1967 and 1971 during

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[2] On cross examination, petitioner was unable to describe the structure of the organization or identify its membership (Tr. 1167-1187). Moreover, during the period 1965-1971, petitioner's net worth increased from $28,000 to $156,000, although his legitimate income was only $14,000 a year (Tr. 1195-1196).

[3] The government was directed "to have the gap narrowed down from a four-year spread * * * to one of months or weeks, if you have that information, and without prejudicing your case" (Tr. of Nov. 13, p. 30).

which the prosecution intended to prove petitioner's receipt of extortion payments (*id.* at 31).

Just prior to trial, the prosecution decided to introduce Kammerer's diaries for 1967 and 1971 in addition to his testimony. Petitioner's counsel was notified of this, and these diaries, as well as those for 1968, 1969, and 1970, were disclosed to him before trial.[4] During the trial, the prosecution decided to introduce some memo books of the witness Continisio, which were written in a code decipherable only by the witness. The court rejected petitioner's objection to their introduction without more notice, because the memos were not lengthy and ample time was afforded for the defense to examine them (Tr. 749-750).

Thus, the prosecution complied fully with the court's orders. It specified the time during which the offenses occurred by identifying the particular months involved, and it disclosed to petitioner each document it intended to use at trial promptly when the decision to use it was made.

Although petitioner alleges that he was denied due process because the prosecution failed to show him the documents earlier, he apparently does not contend that he was prejudiced by this failure (Pet. 5-6). In any event, it is clear that no prejudice occurred and that there was no denial of due process.

Petitioner did not deny receipt of the payments. Instead, he freely admitted taking the funds as charged, but defended on the grounds that he was acting as a conduit for political contributions. The precise dates

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[4] Petitioner reviewed the diaries in the United States Attorney's office the night before trial (Tr. 53).

on which he received the funds were thus not in issue and were evidently as well known to petitioner as to the prosecution.

Moreover, the assertion that petitioner was unaware before trial commenced of the dates of the charged extortion payments is refuted by the record. The government had disclosed to him the months during which it contended the extortion payments had been made. In addition, many dated checks issued by the construction firms involved were included in the 450 documents previously provided petitioner (Tr. 608, 612, 645, 767-770, 897-901). Finally, the record shows that petitioner's counsel had possession of petitioner's own date book, which could have provided ample basis for establishing any alibi or denial of receipt were such a defense feasible (Tr. of Nov. 13, p. 19). We also note that petitioner's attorney demonstrated that he was not surprised by the government's decision to use Kammerer's 1967 and 1971 diaries; he spent considerable time cross-examining Kammerer not only on these two records, but also upon his 1968, 1969, and 1970 diaries, which were introduced as defense exhibits (Tr. 367-378, 385-480). The witness Continisio was similarly cross-examined concerning his memo books (Tr. 851-855).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

DOJ-1973-09